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Information
and Privacy
Commissioner/
Ontario

Submission to the Standing Committee on Industry

Bill C-54, Personal Information Protection and Electronic Documents Act

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Commissioner
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A critical part of the legislative mandate of the Office of the Information and Privacy Commissioner/Ontario (IPC) is to review and comment on the privacy implications of pending legislation. Accordingly, the IPC would like to take this opportunity to offer the Standing Committee on Industry its comments on Bill C-54, the Personal Information Protection and Electronic Documents Act. This document identifies a number of privacy-related issues for the IPC, as well as outlining the IPC's suggested action or wording.

We would like to note from the outset that we believe Bill C-54 is an excellent first step in providing protection for personal information held by private sector organizations. That said, we offer the following remarks, comments and suggestions for consideration as ways to amend the Bill in order to clarify certain points and to ensure that the principles of the Bill are fully articulated.

1. Purpose of the Act - s. 3

A purpose section is an invaluable tool in interpreting and applying a statute. This has been recognized as being of great value by the federal court in interpreting the federal access to information and privacy Acts. "Subsection 2(1) which sets forth the purpose of the Act is not merely descriptive. It provides a guide to the interpretation of the operative provisions of the Act. When Parliament has been explicit in setting forth the purpose of an enactment and principles to be applied in construing it, such purpose and principles must form the foundation on which to interpret the operative provisions of the Act." Canada (Information Commissioner) v. Canada (Prime Minister), [1993] 1 F.C. 427 (T.D.) The significance and importance of a purpose clause were reiterated and confirmed by the Federal Court of Appeal in Rubin v. Minister of Transport [1998] 2 F.C. 430.

The IPC welcomes the inclusion of a purpose clause in the Bill which acknowledges a right to privacy with respect to personal information for all Canadians. However, we feel that the purpose of the Act can be strengthened by re-phrasing, so as to make explicit, many of the facets inherent in privacy protection and the necessary control over personal information by Canadians. We suggest a purpose clause which recognizes that the right to, and the necessity for, informational privacy, is not limited to the commercial context.

Suggested Wording:

> The purposes of this Act are to provide Canadians with a right to privacy with respect to their personal information; to provide individuals with a right of access to personal information about themselves in the custody or control of organizations under this Act; to protect the privacy of the personal information of Canadians which may be disclosed or transferred to organizations and individuals interprovincially or internationally; to provide for the education of the public on privacy issues; to promote the protection of privacy in Canadian society; and to give effect to these principles in an era in which technology increasingly facilitates the collection and free flow of information.

2. Primacy of the Act over Other Legislation

In order to recognize the fundamental nature of the right to privacy, the Act should prevail over other federal legislation in the same way that other human rights legislation has primacy. The Quebec private sector statute, An act respecting the protection of personal information in the private sector, provides that it has primacy over all other Quebec statutes, unless the other statute specifically provides otherwise. A specific statute must expressly state that one of its provisions shall apply notwithstanding the act.

Bill C-54 provides for a minimum standard of privacy and so if other legislation or sectoral codes provide for a greater measure of privacy, we are of the opinion that the legislation or code providing the greatest standard of protection should prevail. For example, if a code of professional conduct provides for a greater measure of confidentiality for personal information, then the professional code provisions should prevail.

If there is no primacy, the protections in Bill C-54 can be diluted by other legislation where special consideration is not given to privacy protection.

Suggested Wording:

> This Act prevails over a provision in any other federal Act except to the extent that the other Act specifically provides otherwise (or to the extent that the other statute or a professional or sectoral code provides a greater measure of privacy for the individual.)

3. Definitions - s. 2(1)

"Record"

Specific reference should be made to biological and biometric samples in order to ensure that their inclusion is understood by those with responsibility for carrying out the objects of this Act.

Suggested Wording:

> "record" includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine-readable record, biometric or biological sample and any other documentary material, regardless of physical form or characteristics, and any copy of any of those things.

4. Application of the Act - s. 4

Subsection 4 (1) of the Bill regulates the collection, use and disclosure of personal information by organizations only in relation to their commercial activity (except where the personal information is personnel related, or where the personal information is transferred interprovincially or internationally).

Personal information of Canadians is collected, used and disclosed on a daily basis by organizations whose primary activity is not commercial. Organizations which collect, hold, use and disclose personal information, but whose primary activities may not appear to be commercial in nature and which may or may not seem to engage in commercial activities include: universities, hospitals, Crown corporations not covered by government privacy legislation, community groups with public objects or functions, non-governmental organizations (NGOs), professional governance bodies, trade and professional associations, trade unions, learned societies, research organizations, employer associations, charitable organizations, churches, health care providers and other professionals such as lawyers and accountants, arts and performance organizations, and non-profit corporations.

It would be preferable if this Bill explicitly extended to these organizations and that the privacy protections afforded by this Bill covered personal information held by them.

"Commercial activity" is not defined in the Bill, and this could give rise to confusion and anomalous results which are hard to justify. Does the term apply only to the activities of the private sector, or does it apply to Crown corporations or to health care facilities, which, while owned privately are publicly funded? Does the term apply to activities of the professions in the course of their business; to accountants but not to doctors or lawyers?

Suggested Wording:

s.4(1) This Part applies to every organization in respect of personal information that:

(a) the organization collects, uses or discloses in the course of its operations and activities;

(b) the organization collects, uses or discloses interprovincially or internationally; or

(c) is about an employee of the organization and that the organization collects, uses or discloses in connection with the operation of a federal work, undertaking or business.

5. Cost of Individual Access to Personal Information - s. 8(6)

Section 8(6) of the Bill provides that an organization may charge for access by the individual to his or her own personal information.

We recognize than an organization may incur some expense in responding to a request for access under the act. However, in view of the fact that the information at issue is the personal information of the individual, a full "user pay" principle is not appropriate. Access to one's personal information in the hands of a third party is a core element of one's privacy rights, and additional costs, if unregulated, could become a barrier to access. We suggest that a schedule of fees, similar to that prevailing for access to personal information in government privacy legislation would be appropriate in the circumstances, and would balance the interests of organizations and individuals in this area.

Suggested Wording:

(6) An organization may respond to an individual's request with a cost to the individual only if

(a) the organization has informed the individual of the approximate cost;

(b) the individual has advised the organization that the request is not being withdrawn; and

(c) the costs are limited to those permitted under legislation regulating access to personal information from government institutions that is in effect in the province in which the request is made.

6. Policy and Education Function of Commissioner

We welcome the inclusion of the important policy development and public education functions of the Commissioner, as outlined in section 24. We recommend the addition of the authority to assess and offer comment on the privacy impact of proposed programs and legislation. We have found that privacy impact assessments have had a profound impact on the consciousness of the public and government alike in developing responses to privacy issues.

Suggested Wording:

> The Commissioner may offer comment on the privacy protection implications of proposed legislative schemes or programs proposed within government or by the private sector, including computer linkages or codes or proposed codes for data users, privacy enhancing technology and the implications for the protection of personal information of new technology.

7. Offences - s. 28

We recommend that the offences set out in section 28 include the wilful or negligent collection, use or disclosure of personal information in contravention of this act. We also recommend that individuals within the organization who commit offences be held personally liable. We believe that the breadth of the penalties for violations of the act should cover the breadth of the responsibilities under the Act. Finally, we suggest that the penalties associated with the offences be increased for repeat offences in order to provide a deterrent, rather than becoming a de facto licencing scheme.

Suggested Wording:

28(1) A person is guilty of an offence if the person:

(a) knowingly or negligently collects, retains, uses or discloses personal information in contravention of this Act or the regulations;

(b) knowingly or negligently fails to comply with the duties under of this Act or the regulations;

(c) obstructs the Commissioner in the performance of his or her duties or powers under this Act or the regulations;

(d) makes a false statement to mislead or attempt to mislead the Commissioner in the performance of his or her functions under this Act or the regulations;

(e) knowingly destroys personal information with an intent to evade a request for access to the personal information under this Act;

(f) knowingly misrepresents the wishes that another person has expressed with respect to the collection, use or disclosure of personal information about him or her.

28(2) An individual who is guilty of a first offence under subsection (1) is liable, on conviction, to a fine of not more than $5,000 and on subsequent convictions to a fine of not more than $10,000 per offence.

28(3) A corporation or group of individuals, including an association or partnership, which is guilty of a first offence under subsection (1) is liable, on conviction, to a fine of not more than $20,000, and on subsequent convictions to a fine of not more than $100,000 per offence.